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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARIO M. CUOMO, ET AL.,

Petitioners,

vs.

THE TRAVELERS INSURANCE COMPANY, ET AL.,

Respondents.

(For Continuation of Caption See Reverse Side of Cover)

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

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13 pp

NEW YORK STATE CONFERENCE OF BLUE CROSS & BLUE SHIELD PLANS and EMPIRE BLUE CROSS AND BLUE SHIELD,

Petitioners,

vs.

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HOSPITAL ASSOCIATION OF NEW YORK STATE,

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Respondents[1] submit this supplemental brief in response to the brief submitted by the Solicitor General as amicus curiae to express the view of the United States (the "Government") as to whether the petitions for certiorari should be granted in this case.

DISCUSSION

1. *The "relating to" issue.*

With regard to whether the surcharge laws "relate to" ERISA plans, the Government recommends that certiorari be granted because of the importance of the issue and a purported conflict among the circuits. On the first point, the Government asserts that the "Second Circuit's decision erroneously expands ERISA's preemption provisions and, as a consequence, improperly confers an immunity for ERISA plans from generally applicable state laws that have only an indirect economic effect on ERISA plans." (Government's Brief 9.) This assertion seriously distorts the Second Circuit's holding in this case. The court of appeals did not hold that a generally applicable state law is preempted whenever it has an indirect economic effect on ERISA plans. On the contrary, the Second Circuit concluded that the laws at issue here are not laws of general application since they are targeted directly at the users of in-patient hospital care in New York, which (as the Government itself concedes) are overwhelmingly ERISA plans (A-6, 22; Government's Brief 4, 17). The Second Circuit further concluded that the surcharge laws were preempted because they were specifically designed to compel ERISA plans to provide their members with health care through New York's

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[1] This supplemental brief is submitted on behalf of respondents The Travelers Insurance Company, Health Insurance Association of America, American Council of Life Insurance, Life Insurance Council of New York, Inc., Aetna Life Insurance Co., Aetna Health Plans of New York, Inc., Mutual of Omaha Insurance Company, The Union Labor Life Insurance Company and Professional Insurance Agents of New York, Inc. Trust.

financially distressed Blue Cross system, rather than through self-insurance, commercial insurance or an HMO, and, therefore, "purposely interfere[d] with the choices that ERISA plans make for health care coverage." (A-22.) In short, the surcharge laws would have virtually no meaning absent ERISA plans. The Government's characterization of these statutes as "generally applicable" state laws is fundamentally wrong.

Indeed, it is quite surprising that the Government takes issue with the Second Circuit's holding on the "relating to" issue since it strenuously argued in favor of it in an amicus brief submitted below. Specifically, the Government argued before the Second Circuit that the surcharge laws "relate to" ERISA plans for two reasons:

> First, the surcharges "refer to" plans because they single plans out for differential treatment — treatment that is worse than that accorded certain other purchasers of hospital services. For example, a self-funded plan or a plan insured with a commercial insurer must pay the 13% surcharge on hospital rates, while Blue Cross/Blue Shield is exempt. Similarly, plans insured with commercial insurers are also subject to the 11% surcharge, but the Blues are not. Finally, plans that contract with HMOs are liable for the 9% surcharge from which all other individuals and plans are excused.
>
> *Mackey* teaches that statutes cannot single plans out for preferential treatment without running afoul of § 514's "relates to" clause. *Mackey*, 108 S.Ct. at 2190 n.12 ("*[A]ny* state law which singles out ERISA plans, by express reference, for special treatment is preempted." (emphasis by the Court)); *see also Ingersoll-Rand*, 111 S.Ct. at 483 (Texas cause of action "relates to" plan because it "makes specific reference to, and indeed is premised on, the existence of a pension plan."). *A fortiori*, statutes that discriminate against plans as opposed to non-plans "relate to" plans as well.

> Accordingly, the surcharges "refer to" plans within the meaning of ERISA § 514.
>
> In addition, the surcharges have a "connection with" plans, for their intent and effect is to alter plan behavior. The surcharges are designed to induce self-insured plans to become insured, in order to avoid the 13% surcharge, and to encourage already-insured plans to purchase coverage from the Blues, in order to avoid the 13% and 11% surcharges. Finally, plans that contract with HMOs are given a strong incentive to rewrite their plan documents so as to cover more Medicaid recipients and reduce or eliminate the 9% surcharge. *Shaw*, *Metropolitan [Life Ins. Co.] v. Massachusetts* and *General Electric v. New York Dep't of Labor* all hold that such changes in plan structure and benefit levels constitute the requisite "connection" for purposes of § 514.

(Government's Second Circuit Brief 19-20.)[2] In essence, the Government now argues that the Second Circuit fundamentally misconstrued the law by adopting the Government's position. Yet, the Government has not provided an explanation as to why it has decided to reverse its position, or why this sudden and unexplained reversal necessitates the intervention of this Court.

Further, in its amicus brief in this Court, the Government's analysis of the surcharge statutes is based on a fundamental misunderstanding of those laws. It argues that the surcharge laws do not "relate to" ERISA plans because "the only effect that the surcharges in this case have on ERISA plans is both indirect (because the surcharges do not apply to the plans themselves, but are generally applicable to insurers and other health carriers whose services are purchased both by ERISA plans and others) and solely economic (because the surcharges

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[2] Copies of this brief are being lodged with the Clerk of this Court.

affect only the costs of services ERISA plans purchase, and thus do not dictate the type or nature of benefits that ERISA plans may or must offer to participants or regulate how an ERISA plan must be administered)." (Government's Brief 13) (footnote omitted). The Government is wrong on both points. The 13% surcharge applies directly to self-insured ERISA plans.[3] Therefore, the impact is direct. In addition, the purpose of the surcharge laws is to dictate that ERISA plans provide their members with health care coverage through New York's financially distressed Blue Cross system, rather than through commercial insurance, self-insurance or an HMO. Thus, the laws interfere with an ERISA welfare plan's single most important decision — how best to provide health care to its members.[4] Plainly, the impact of the laws is not solely economic.

The Government's understanding of the facts is also flawed. For instance, the Government repeatedly advances the view that questions involving ERISA's "deemer" clause, 29 U.S.C. § 1144(b)(2)(B), are not presented by this case "since no self-funded ERISA plan is among the plaintiffs." (Government's Brief 14-15 n.7.) The Government also states that "[n]one of the plaintiffs in this case is a self-insured fund, and none of them thus appears to have standing to challenge the application of the 13% surcharge to self-insured funds." (Government's Brief 14 n.5.) Once again, the Government is simply wrong. Questions concerning the "deemer" clause are, indeed, before this Court since the plaintiffs include self-insured plans. For instance, plaintiff The Travelers Insurance Company sued in its capacity as a fiduciary of the Sheridan Catheter plan, a self-funded ERISA plan.

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[3] New York Public Health Law Section 2807-c(1)(b) requires that the rate for in-patient services be increased by a 13% surcharge when the patient is "enrolled in a self-insured fund."

[4] In the lower courts, the State and the Blues acknowledged that the undisputed purpose of the surcharge laws was to "level the playing field" for the Blues "in their competition with commercial insurers. . . ." (Joint Appendix in the Second Circuit 649.) This buttresses the Second Circuit's conclusion that the purpose of the surcharge laws was to influence ERISA plan behavior.

The Government also argues that certiorari should be granted in this case because there exists a conflict between the decisions of the Second Circuit in this case and the Third Circuit in *United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179 (3d Cir.), *cert. denied*, 114 S. Ct. 382 (1993). In their brief in opposition (at 15-17), respondents explained why there is no true conflict. In essence, the New Jersey laws at issue in *United Wire* were fundamentally different from those at issue here. New Jersey's laws were not designed to influence an ERISA welfare plan's most fundamental decision — how best to provide its members with health care. Further, two of the laws at issue in this case — the 9% and 11% surcharges — have nothing to do with hospital reimbursement or the containment of hospital costs. The funds associated with those surcharges end up in New York State's general fund. The Third Circuit had nothing of this kind before it in *United Wire*. Moreover, in *United Wire*, the Third Circuit relied on the Second Circuit's ten-year-old ruling in *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985), which the Second Circuit overruled in this case. It therefore remains an open question how the Third Circuit would rule on the ERISA preemption issue presented here in light of the Second Circuit's overruling of *Rebaldo*.

2. *The savings clause issue.*

Turning to the savings clause, the Government acknowledges that the Second Circuit applied the correct legal standards to this issue, but argues that the court came to the wrong conclusion. Even if true, those contentions do not warrant this Court's review.

In any event, the Government is mistaken in its analysis of the savings clause issue. The Government erroneously concludes that a regulation of hospital rates intended to influence a "marketplace" in which insurers participate is a regulation of insurance within the meaning of ERISA's savings clause. Although the surcharge laws have an impact on insurance companies, that alone is not enough. As this Court has made clear

in interpreting the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, the exemption at issue is limited to "the business of insurance" and does not apply in the case of any law having an impact on the "business of insurance companies." *Group Life & Health Ins. Co. v. Royal Drug Co., Inc.*, 440 U.S. 205, 210-11 (1979).

This error infects the Government's analysis of each of the various factors used to identify whether a practice is a regulation of insurance for purposes of ERISA and the McCarran-Ferguson Act. For instance, the Government argues that the surcharges regulate insurance as a matter of common sense because they turn on "the payor's status as a participant in the insurance marketplace," without regard to whether they regulate insurance as such. Likewise, with respect to whether the surcharges regulate a practice that is an integral part of the policy relationship between the insurer and the insured, the Government argues that the surcharges satisfy this requirement since they "are premised on the open enrollment and community rating policies of the Blues and HMOs. . . ." (Government's Brief 15.) As the Second Circuit held in *Howard v. Gleason Corp.*, 901 F.2d 1154, 1159 (2d Cir. 1990), the essence of this factor is whether the statute "dictate[s] any of the terms of the insurance contract itself, the principal embodiment of the insurer-insured relationship." The surcharge laws do not directly change any of the terms, conditions or scope of coverage in an insurance contract. They simply regulate hospital rates. Therefore, they do not regulate any practice that is an integral part of the policy relationship between the insurer and the insured.

As to the third McCarran-Ferguson factor, the Second Circuit correctly found that the surcharge laws were not limited to entities in the insurance industry since they involved hospitals, HMOs and New York State itself. The Government's suggestion (at 16) that the third factor has been satisfied "[s]o long as the amount of the surcharges is determined solely by the nature of the payor" is totally beside the point.

3. *The Government has failed to explain why the decision of the Second Circuit warrants review by this Court.*

On the "relating to" issue, the Government's primary concern is that the decision below will undermine the ability of the states to implement legislation controlling hospital costs. This concern is meritless for a number of reasons. First, the court of appeals did not hold or suggest that ERISA precludes a state from regulating hospital rates. By way of example, respondents did not challenge, and the court of appeals did not void, New York's DRG system of hospital rate regulation. On the contrary, respondents challenged, and the court of appeals invalidated, only those aspects of New York's hospital rate system which were specifically designed to alter ERISA plan behavior.

Further, the only case the Government cites to support this concern is *NYSA-ILA Medical and Clinical Servs. Fund v. Axelrod*, 27 F.3d 823 (2d Cir. 1994). That case, however, did not have anything to do with legislation designed to control hospital costs. On the contrary, that case involved a New York State tax on a health care facility operated by an ERISA plan. The sole purpose of the tax was to eliminate New York's budget deficit for the 1990-91 fiscal year.

Moreover, since the court of appeals adopted the position advanced by the Government in its Second Circuit amicus brief on the "relating to" issue, it is difficult to understand why the Government suddenly feels that this result will have pernicious consequences.

With regard to the savings clause issue, the Government does not and cannot argue that this Court's review is needed to resolve a conflict among the circuits or that the Second Circuit's decision is of national significance.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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